Supreme Court, U.S.
FILED
1997
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(5)

CAPITAL CASE
1997
EXECUTION DATE

No. 96-8400

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

DOUGLAS McARTHUR BUCHANAN,

Petitioner,

v.

RONALD J. ANGELONE, DIRECTOR, et al.

Respondents.

CAPITAL CASE: APRIL 8, 1997 EXECUTION DATE

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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15 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. THE FOURTH CIRCUIT'S DECISION THAT A JURY CHARGE WHICH INCLUDES NO REFERENCE TO STATUTORILY DEFINED MITIGATING CIRCUMSTANCES, DESPITE COUNSEL'S REQUEST FOR SUCH INSTRUCTIONS, AND WHICH DOES NOT MENTION THE WORD "MITIGATION," DOES NOT VIOLATE THE EIGHTH AMENDMENT CONFLICTS WITH GREGG V. GEORGIA, LOCKETT V. OHIO, CALIFORNIA V. RAMOS AND THEIR PROGENY, INCLUDING DECISIONS OF THE FORMER FIFTH AND THE ELEVENTH CIRCUITS. 2

B. THE FOURTH CIRCUIT'S DECISION UPHOLDING THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY AS TO VIRGINIA'S STATUTORY MITIGATORS CONFLICTS WITH ELEMENTARY PRINCIPLES OF DUE PROCESS AS SET FORTH IN PRIOR DECISIONS OF THIS COURT 6

C. THE DECISION OF THE COURT OF APPEALS, APPROVING THE TRIAL COURT'S DECISION TO EXCLUDE RELEVANT MITIGATING EVIDENCE UPON WHICH THE EXPERTS FOR BOTH SIDES HAD RELIED, BASED UPON THE MECHANICAL APPLICATION OF A HEARSAY RULE, VIOLATES THIS COURT'S DECISIONS IN GREEN V. GEORGIA AND CHAMBERS V. MISSISSIPPI AND THE RULE OF MONTANA V. EGELHOFF. 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES PAGE

Boyde v. California, 494 U.S. 376 (1990) 3, 4

California v. Ramos, 463 U.S. 992 (1983) . . . . . passim

Eddings v. Oklahoma, 455 U.S. 104 (1982) 11

Estelle v. McGuire, 502 U.S. 62 (1991) 8

Gregg v. Georgia, 428 U.S. 153 (1976) . . . . . passim

Green v. Georgia, 442 U.S. 95 (1979) . . . . . passim

Hicks v. Oklahoma, 447 U.S. 343 (1980) 9

Lockett v. Ohio, 438 U.S. 586 (1978) 11

Montana v. Egelhoff, 116 S.Ct. 2013 (1996) 10

Romano v. Oklahoma, 114 S.Ct. 2011 (1994) 10

Rupe v. Wood, 93 F.3d 1434 (9th Cir. 1990) 10

Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978), cert. denied, 441 U.S. 967 (1979) 7, 8

Stringer v. Black, 503 U.S. 222 (1992) 5

Teague v. Lane, 489 U.S. 288 (1989) 6

Tuggle v. Netherland, 116 S.Ct. 283 (1995) 5

Walton v. Arizona, 497 U.S. 639 (1990) 2

Zant v. Stephens, 462 U.S. 862 (1983) 5

STATUTES

Va. Code § 8.01-401.1 11

Va. Code § 19.2-264.4 7

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ARGUMENT

Respondent substitutes the Virginia Supreme Court's recitation of the facts on direct appeal for a discussion of the actual evidence in the case. The relevant evidence at issue here, of course, is that which supported petitioner's requests for jury instructions and his attempt to adduce the excluded claim of his mental health expert. It is that evidence, set forth in Buchanan's Petition, which respondent chooses to ignore.

A. THE FOURTH CIRCUIT'S DECISION THAT A JURY CHARGE WHICH INCLUDES NO REFERENCE TO STATUTORILY DEFINED MITIGATING CIRCUMSTANCES, DESPITE COUNSEL'S REQUEST FOR SUCH INSTRUCTIONS, AND WHICH DOES NOT MENTION THE WORD "MITIGATION," DOES NOT VIOLATE THE EIGHTH AMENDMENT CONFLICTS WITH GREGG V. GEORGIA, LOCKETT V. OHIO, CALIFORNIA V. RAMOS AND THEIR PROGENY, INCLUDING DECISIONS OF THE FORMER FIFTH AND THE ELEVENTH CIRCUITS.

What is most extraordinary about respondent's Brief is its complete silence as to the controlling cases of this Court upon which petitioner has primarily relied, Gregg v. Georgia, 428 U.S. 153 (1976), California v. Ramos, 463 U.S. 992 (1933) and Walton v. Arizona, 497 U.S. 639, 653 (1990). The reason for that omission is self-evident. Respondent simply can not argue, in light of this Court's repeated declaration that juries must be carefully guided as to both aggravating and mitigating circumstances, that the Constitution is satisfied by no guidance at all as to the mitigation side of the sentencing equation?

Remarkably, respondent attempts to avoid the trial court's utter failure to provide the guidance demanded by Gregg and Ramos by reciting verbatim the very instruction which was devoid of any mention of mitigation. He seizes upon the trial judge's instruction to consider "all the evidence," even though that advice plainly does not satisfy the constitutional requirement of "careful guidance." Similarly, his reliance on the *pro forma* recitation in the verdict form, a document the jury need not consider until after it has reached its decision, that the jury has considered the "evidence in mitigation," hardly satisfies the constitutional requirement.

To support his argument that the instructions here were constitutionally adequate, respondent relies, entirely out of context, on the use of an instruction to "consider all the evidence" in Boyde v. California, 494 U.S. 376 (1990), *see, Brief in Opposition at 7.*[1] That decision, however, rather than supporting respondent's argument, serves to demonstrate, quite dramatically, the inadequacy of the instructions in Buchanan's case. In Boyde the "consider all the evidence" instruction played a minimal role in guiding the jury; in Buchanan, jurors were left without any meaningful guidance as to the only real issue at sentencing -- whether the mitigating evidence supported a verdict for a sentence other than death.

The trial court in Boyde, consistent with the request of Buchanan, instructed the jury as to ten specific mitigating circumstances and also provided a "catch-all" instruction directing the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse of the crime." 494 U.S. at 373 n.1, 374. Moreover, "extenuate" was defined for the jurors "to mean 'to lessen the seriousness of a crime as by giving an excuse,'" Id. at 381. It was in this context of careful and specific guidance as to the mitigating circumstances presented in Boyde that this Court

[1] Respondent also asserts that the "courts uniformly have rejected" Buchanan's Eighth Amendment claim. *Brief in Opposition at 5 (emphasis added).* That assertion is disingenuous indeed, since, as his own citations demonstrate, the claim has only been rejected by the Virginia Supreme Court and the Fourth Circuit, in the context of reviewing the Virginia rule in Buchanan's case and those of other Virginia capital defendants. *Id.*

mentioned the "consider all the evidence" instruction as additional support for its conclusion that the instructions were adequate when considered as a whole. Id. at 383. Thus, Boyde hardly lends support to the notion that a "consider all the evidence" instruction standing alone -- with no reference to specific mitigating circumstances, no definition of mitigation, no "catch-all" instruction, no discussion of the role of mitigation in the sentencing process, and not even a mention of mitigation, other than in the form with which the jurors announce their verdict -- satisfies the commands of Gregg and Ramos.

Boyde also defeats respondent's suggestion that the presentation of mitigating evidence or the argument of counsel is sufficient to satisfy the Eighth Amendment. Addressing the first point, this Court noted that the "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence." 494 U.S. at 384 (emphasis added). In addition, addressing the second point, the Court stated specifically that the argument of counsel could not make up for the absence of adequate instructions. Id. Indeed, if respondent's argument is correct -- that the presentation of, and counsel's argument concerning, mitigating evidence are sufficient to satisfy the constitutional requirement for careful guidance -- instructions are superfluous and Gregg and Ramos are meaningless. Indeed, under respondent's contorted argument, the necessity for instructions is inversely proportional to the evidence and

argument supporting them; they are required only where mitigation is not a substantial element of the defendant's case.

Like the Fourth Circuit, respondent divorces the holding in Zant v. Stephens, 462 U.S. 862 (1983) from its context. *See, Brief in Opposition at 7 & n.2.* The Court's limited holding in Zant is clear:

> [T]he absence of legislative or court-imposed standards to govern the jury in weighing the significance of either or both of th[e] aggravating circumstances does not render the Georgia capital sentencing statute invalid as applied in this case.

462 U.S. at 880 (emphasis added). Thus, in no sense was the Court in Zant upholding the failure to mention mitigation or statutory mitigating circumstances. It was simply affirming a state's right not to require that aggravating and mitigating circumstances be weighed.[2] *See, Petition for Writ of Certiorari at 16.*

Lastly, respondent raises in passing new § 2254(d) of Title 28 of the United States Code and the "new rule" doctrine. He neither discusses the retroactivity of the amendments to Title 28, nor presents any analysis of the application of the "new rule" doctrine. To the extent respondent implicitly relies upon the prior decisions of the Fourth Circuit, the "short answer" is the same as in Stringer v. Black, 503 U.S. 222, 237 (1992): the Court of Appeals "made a serious mistake." The requirement that

[2] Contrary to the suggestion of respondent, petitioner has not asserted that the Fourth Circuit's misapplication of Zant in Tuggle v. Netherland, 116 S.Ct. 283 (1995)(per curiam) was the same misapplication as here.

juries be carefully guided as to mitigating circumstances was unmistakably established by Gregg and Ramos, both of which were decided many years prior to Buchanan's trial. Thus, petitioner does not seek a new rule when he protests the refusal of the trial court to instruct the jury as to statutory mitigating circumstances and to "consider the circumstances surrounding the offense, the history and background of [Buchanan] and any other facts in mitigation of the offense."[3]

B. THE FOURTH CIRCUIT'S DECISION UPHOLDING THE REFUSAL OF THE TRIAL COURT TO INSTRUCT THE JURY AS TO VIRGINIA'S STATUTORY MITIGATORS CONFLICTS WITH ELEMENTARY PRINCIPLES OF DUE PROCESS AS SET FORTH IN PRIOR DECISIONS OF THIS COURT.

One need look no further than respondent's extraordinary assertion that the state, not the Constitution, determines "what process ... is due," *Brief in Opposition at 10*, to recognize the fallacy in his entire argument. This attempt to stand all Due Process jurisprudence on its head is precluded by, *inter alia*, this Court's specific holdings that, while the substantive law applicable to capital cases is largely left to the states, the procedural requirements imposed by the Eighth Amendment and the Due Process Clause are not.[4] *See*, Ramos, 463 U.S. at 999-1000.

[3] Additionally, assuming *arguendo* that it would be deemed new, the rule sought by petitioner would plainly fall within the second exception to the doctrine, which is applicable to "'those procedures that ... are 'implicit in the concept of ordered liberty....'" Teague v. Lane, 489 U.S. 288, 311 (1989)(citations omitted). *See, Petition for Writ of Certiorari at 25 n.10.*

[4] As Buchanan has noted in his Petition for Writ of Certiorari (at 23), the elementary concept that state law defines the substantive law, but the constitution defines what process is

Contrary to the argument of respondent and the decision of the Fourth Circuit, the issue is not whether state law requires the jury instructions which petitioner sought, but whether, once the state has identified those factors it "'deems particularly relevant to the sentencing decision,'" id. at 1000, *quoting*, Gregg, 428 U.S. at 192, the defendant, as a matter of due process, is entitled to have his jury instructed as to those determinations. Absent this fundamental flaw in his analysis, respondent is left with no defense to the claim at all.

As part of his attempt to mischaracterize Va. Code § 19.2-264.4 as merely an evidentiary statute, respondent urges an interpretation which not only is inconsistent with the language and history of the statute,[5] but which defies the plain declaration of the Virginia Supreme Court as to its meaning: the statute "provides a list of mitigating circumstances which the fact finder is required to consider in pari materia with aggravating circumstances." Smith v. Commonwealth, 248 S.E.2d 135, 145 (Va. 1978), cert. denied, 441 U.S. 967 (1979).

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due applies not just in the context of criminal law.

[5] While the first two sentences of Subsection B first refer to "evidence," without distinction between that which would and would not be favorable to the defendant, the next sentence both references mitigation only and "facts" rather than "evidence." ("Facts in mitigation may include, but shall not be limited to" the circumstances specified).

Respondent also fails to explain why, for example, the General Assembly added mental retardation to the statute, or, for that matter, why the statute even exists, if it governs the admissibility of evidence which, constitutionally, can not be limited in the first place. *See, Petition for Writ of Certiorari at 12 n.7.*

Respondent attempts to solve this problem the same way he attempts to solve the problem posed by Gregg and Ramos: he pretends Smith does not exist.[6] Since respondent's proffered explanation of the statute is plainly wrong, his reliance on Estelle v. McGuire, 502 U.S. 62 (1991), a decision addressing state evidentiary rules, is entirely misplaced.

As another part of its twist on the Due Process Clause, respondent insists that it is solely the responsibility of the Virginia Supreme Court, not the legislature, to determine the nature of Virginia's capital sentencing scheme. *Brief in Opposition at 9 n.5.* Contrary to respondent's argument, however, it is legislative determinations concerning the most relevant sentencing factors that are entitled to federal court deference. *See, e.g.*, Ramos, 463 U.S. at 1000, *quoting*, Gregg, 428 U.S. at 176 ("'The deference we owe to the decisions of the state legislatures under our federal system ... is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy'"); Ramos, 463 U.S. at 1000 n.11 ("... [I]n approving the sentencing schemes of Georgia, Florida, and Texas, the joint opinions of Justices Stewart, Powell, and Stevens did not substitute their views for those of the state legislatures as to the particular substantive

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[6] The fundamental disingenuousness of respondent's argument is well demonstrated by his assertion, on the one hand, that the Virginia Supreme Court is the "final arbiter" of state law, and, on the other hand, his refusal to acknowledge that Court's interpretation of the sentencing statute.

factors chosen to narrow the class of defendants eligible for the death penalty...").[7]

In short, respondent's Due Process argument (1) is dependent upon an interpretation of the Virginia sentencing statute that is entirely inconsistent with its interpretation by the Virginia Supreme Court, (2) removes from state legislatures the power to determine appropriate sentencing factors in capital cases, and (3), most remarkably, turns all of Due Process jurisprudence on its head by committing to state courts the authority to determine not merely substantive state law, but "what process is due." Plainly, respondent's argument must fail.

C. THE DECISION OF THE COURT OF APPEALS, APPROVING THE TRIAL COURT'S DECISION TO EXCLUDE RELEVANT MITIGATING EVIDENCE UPON WHICH THE EXPERTS FOR BOTH SIDES HAD RELIED, BASED UPON THE MECHANICAL APPLICATION OF A HEARSAY RULE, VIOLATES THIS COURT'S DECISIONS IN GREEN V. GEORGIA AND CHAMBERS V. MISSISSIPPI AND THE RULE OF MONTANA V. EGELHOFF.

Respondent argues that Green v. Georgia, 442 U.S. 95 (1979) is inapplicable to this case because the specific state evidentiary rule at issue there is not the same as the rule at issue in Buchanan's case. Plainly, the rule of Green was never intended to be limited to a single evidentiary rule. Rather, the

[7] That is not to say that a state court is necessarily precluded from making that determination, although respondent has not cited a single case in which deference was given to such a determination by a state court. It is only to say that such determinations are usually made by the legislature, as they have been in Virginia, and that, as in Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980), the state courts may not deprive defendants of the benefit of legislative determinations as to the applicable substantive law.

question under Green is whether the excluded testimony "was highly relevant to a critical issue in the punishment phase of the trial" and "substantial reasons existed to assume its reliability." 442 U.S. at 97. Where those conditions are met, the "mechanistic" application of a state evidentiary rule violates the Due Process Clause. Id.

Here, the evidence was unquestionably "highly relevant" to the critical question of petitioner's mental state at the time of the killings. While Dr. Brown was able to discuss those facts upon which he had relied which had been independently presented in open court, he could not mention any matters which had not been presented.[8] As the prosecutor himself recognized, the reliability of those opinions, as well as that of Dr. Brown, was dependent upon both the facts which were presented and those which were not. (App. E34).

While it is correct that the constitution does not create a "'federal code of evidence...,'" *see, Brief in Opposition at 12, quoting,* Romano v. Oklahoma, 114 S.Ct. 2011, 2011 (1994), it is equally true that the exclusion of relevant exculpatory evidence based upon the "mechanistic" application of state evidentiary rules violates the Constitution. Montana v. Egelhoff, 116 S.Ct. 2013, 2026-27 (1996) (O'Connor, J., dissenting). *See, Petition*

[8] For example, the maternal grandfather spent significant time with Dr. Brown, yet when he testified at trial he did not go into great depth about the family turmoil. When Dr. Brown attempted to discuss additional information which he had obtained from the grandfather, the trial court sustained the prosecutor's objection. (App. E-26, 27).

for Writ of Certiorari at 26. Since the evidence was relevant and exculpatory, its exclusion was improper if "substantial reasons existed to assume its reliability," "[r]egardless of whether the proffered testimony" was admissible under state law. *See*, Green, 442 U.S. at 97.

In Green itself, this Court noted that the most important factor for assessing the reliability of the excluded evidence was that "the State considered the testimony sufficiently reliable to use it[.]" 442 U.S. at 97. That is precisely what happened here. The Commonwealth and its experts specifically relied on the excluded evidence and even testified to its reliability and value. Indeed, in its Brief in the Court of Appeals, respondent himself asserted that "the factual bases for Dr. Brown's opinions were not in dispute." (App. S-1). Thus, the evidence excluded by the trial court was not only highly relevant, but it was "sufficiently reliable" to require its admission.[9] The "exclusion of relevant evidence because of doubts about reliability violates the principle of Lockett [v. Ohio, 438 U.S. 586 (1978)] and Eddings [v. Oklahoma, 455 U.S. 104 (1982)] by interfering with the jury's ability to weigh mitigating factors." Rupe v. Wood, 93 F.3d 1434, 1440 (9th Cir. 1990)(emphasis added).

Respondent also notes counsel's statements that they did not want a continuance to try to bring in the witnesses upon whose statements the experts had relied. The trial court's offer of an

[9] In addition, the same evidence would have been admissible in a civil trial in Virginia. Va. Code § 8.01-401.1.

alternative, albeit impractical, [10] method for introducing the evidence does not negate the fact that the exclusion of the evidence constituted a Constitutional violation. If the evidence, as here, has sufficient indicia of reliability, it may not be excluded simply because the trial court would allow counsel the opportunity to try to obtain the evidence otherwise.

Finally, respondent asserts, without benefit of analysis, that Buchanan seeks a "new rule." As the foregoing discussion demonstrates, he plainly does not. Indeed, the District Court properly observed that respondent's claim that the exclusion of this evidence does not rise to a Constitutional violation is "clearly in conflict with Green v. Georgia." (App. B-p.18).

CONCLUSION

For the foregoing reasons, this Court should grant petitioner a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit

Respectfully submitted,

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[10] Some witnesses, like Buchanan's grandfather, had already been excused, some were old and some were out of state. (App. E-25).